AMERICAN EXPRESS BANK LTD.

v.

MOHAMAD TOUFIC AL-OZEIR & ANOR.

SUPREME COURT, KUALA LUMPUR
DATO' PEH SWEE CHIN SCJ
DATUK WIRA WAN YAHYA BIN PAWAN TEH SCJ
DATO' MOHAMED DZAIDDIN BIN HAJI ABDULLAH SCJ
[CIVIL APPEAL NO. 02-225-1994]
12 DECEMBER 1994

***JURISDICTION**: Writ action against foreign defendant - Action based on tort committed in Malaysia - Whether High Court in Malaysia had jurisdiction to entertain claim - Order 11 r. 1(1)(h) Rules of the High Court 1980.*

***JURISDICTION**: Writ action against foreign defendant - Plea of forum non conveniens - Scope and meaning - Whether Malaysia the most appropriate forum - Whether action more suitably tried by foreign tribunal - Burden of proof of appropriateness of forum - Whether on the plaintiff.*

***PRACTICE & PROCEDURE**: Order 11. r.1 RHC 1980 - Leave to issue and serve notice of writ of summons out of jurisdiction - Application to set aside leave on grounds of lack of juridiction and forum non conveniens - Distinction of grounds thereof - Whether necessary for Court to clarify - Whether Court to consider both grounds separately.*

***WORDS AND PHRASES JUDICIALLY DEFINED**: "forum non conveniens".*

The appellant is a foreign bank based in Singapore. In 1992 the appellant entered into two agreements with the respondents, who were residents in Malaysia, to assist the latter in some foreign exchange transactions. These agreements were executed in Singapore. Information and advice pertaining to the transactions were then passed by the appellant to the respondents in Kuala Lumpur and following that several foreign exchange transactions were executed in London, New York and Singapore. By the said agreements, both parties agreed to submit to the jurisdiction of the Singapore Court and be governed by the laws of Singapore.

Following losses suffered from the transactions, the respondents filed a writ action in Kuala Lumpur High Court and claimed damages for fraudulant misrepresentations. Leave to issue and serve the notice of writ of summons out of jurisdiction on the appellant was later granted by the Deputy Registrar. On 24 December 1993, the appellant applied to the High Court to set aside the said leave, pleading the Malaysian Court's lack of jurisdiction to try the case and the maxim of *forum non conveniens.*

The learned Judge dismissed the application and ruled, on the authority of *Diamond v Bank of London & Montreal* [1979] 1 QB 333, that the tort of fraudulent misrepresentation, when made by telephone or telex, was committed at the place where the message was received and acted on, and not at the place it was sent, and on that ground held that the tort in this case was committed in Malaysia, thus giving the Malaysian Court jurisdiction to hear the case. According to the learned Judge further, the fact that the tort was committed in Malaysia overrode all other considerations and the plea of *forum non conveniens* must also therefore fail. The appellant hence appealed.

Before the Federal Court the primary issues that arose were:

1. Whether on the facts the High Court in Malaysia had jurisdiction to hear the action thus filed.

2. Whether in the circumstances of this case the Malaysian High Court was or was not the *forum non conveniens*.

Held:

[1] A Malaysian Court has jurisdiction over a foreign defendant at common law if the said defendant is residing in Malaysia or if he submits to jurisdiction if not so present. However if he is not present here and has not submitted to jurisdiction, the Malaysian Court can assume such jurisdiction statutorily under O. 11 r. 1 of the Rules of The High Court 1980, as jurisdiction is implicit in the power to grant leave by the High Court for service out of jurisdiction. Further, O. 11 r. 1(1)(h) of the RHC expressly provides for service out of jurisdiction "if the action begun by writ is founded on a tort committed within the jurisdiction". In the present case, although the appellant was not present within the jurisdiction and had not submitted to the jurisdiction of the Malaysian Court, the fact remains that the statement of claim was cast in tort committed in Malaysia. The Malaysian Court therefore had jurisdiction to entertain the claim of the respondents and the learned Judge was right in ruling the way he did on this issue.

[2] Having such jurisdiction however is not the end of the matter as the Court still has the discretion to decide whether to deal with the case on the doctrine of *forum non conveniens.* Hence, even after ruling that it had jurisdiction to hear the claim, the High Court would have to consider next, to exercise its discretion on the doctrine of *forum non conveniens* as to whether to allow or not the application of the appellant to set aside the leave to issue and serve out of jurisdiction granted earlier to the respondent under O. 11 r. 1 RHC.

[3] The learned Judge's reasoning in respect of his ruling on the issue of *forum non conveniens*, however, is rather inadequate and there was some failure to bear in mind sufficiently the distinction between the point of jurisdiction and that of *forum non conveniens*. The fundamental principle in regard to the doctrine of *forum non conveniens* is that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all parties and also for the ends of justice. The word "*conveniens*" here, however, means suitability and appropriateness of the relevant jurisdiction and not one of convenience.

[4] In the context of the present appeal, where leave to issue and serve out of jurisdiction a notice of writ of summons under O. 11 r. 1 of the RHC is involved, the onus is on the respondents, they being the plaintiffs, to satisfy the High Court below that Malaysia was the most appropriate forum. This apart, the High Court is also obliged to consider other factors including the question of whether it would be unjust to the respondents to confine them to remedies elsewhere. Another glaring factor to consider is the foreign-jurisdiction clauses in the agreements.

[5] The respondents had clearly failed to satisfy the Court that the Malaysian Court was the most appropriate forum to try the action. The facts showed that except for the fact that the alleged fraudulent and misleading information from the appellant to the respondents were received by the respondents in Kuala Lumpur, all other transactions had taken place outside Malaysia. The relevant securities of the respondents were also deposited with the appellant bank in Singapore and London and not in Malaysia. And although both the respondents were residents in Malaysia, the main protagonists from the appellant's camp were clearly

residents outside Malaysia, either in London or Singapore. Also, there were no peculiar difficulties which the respondents would face apart from the inconvenience and expenses of crossing the highway to Singapore, if the action is heard there. In the event, Singapore must be the more suitable forum to try the action.

[Appeal allowed]

[**Bahasa Malaysia** Translation of Headnote]

***BIDANGKUASA**: Tindakan writ terhadap defendan asing - Tindakan berdasarkan tort yang dilakukan di Malaysia - Sama ada Mahkamah Tinggi di Malaysia mempunyai bidangkuasa untuk menimbangkan tuntutan - Aturan 11 kaedah 1(1)(h) Kaedah-Kaedah Mahkamah Tinggi 1980.*

***BIDANGKUASA**: Tindakan writ terhadap defendan asing - Rayuan forum non conveniens - Skop dan maksud - Sama ada Malaysia merupakan forum yang paling wajar - Sama ada tindakan lebih sesuai dibicarakan oleh tribunal asing - Beban membukti kewajaran forum - Sama ada ke atas plaintif.*

***AMALAN & PROSEDUR**: Aturan 11 kaedah 1 Kaedah-Kaedah Mahkamah Tinggi 1980 - Izin utuk mengeluarkan dan menyampaikan notis writ saman di luar bidangkuasa - Permohonan untuk mengenepikan izin atas alasan ketiadaan bidangkuasa dan forum non conveniens - Perbezaan pada alasan - Sama ada perlu dijelaskan Mahkamah - Sama ada Mahkamah harus menimbangkan kedua-dua alasan secara berasingan.*

***PERKATAAN & ISTILAH**: "Forum non conveniens"*

Perayu adalah bank asing yang berpejabat di Singapura. Dalam tahun 1992, perayu telah memasuki dua perjanjian dengan responden-responden yang merupakan pemastautin di Malaysia, untuk membantu pihak terkemudian dalam beberapa transaksi penukaran wang asing. Perjanjian-perjanjian ini telah disempurnakan di Singapura. Maklumat-maklumat dan nasihat berhubung dengan transaksi tersebut telah kemudiannya dikemukakan oleh perayu kepada responden-responden di Kuala Lumpur dan berikutan itu beberapa transaksi penukaran wang asing telah disempurnakan di London, New York dan Singapura. Melalui perjanjian tersebut, adalah jelas bahawa kedua-dua pihak bersetuju untuk dikuasai oleh undang-undang Singapura.

Akibat kerugian yang dialami daripada transaksi-transaksi tersebut responden-respodnen telah menfailkan writ tindakan di Mahkamah Tinggi Kuala Lumpur menuntut gantirugi bagi salah nyata fraud. Izin untuk mengeluar dan menyampaikan writ diluar bidangkuasa kemudiannya diberikan oleh Timbalan Pendaftar. Pada 24 Disember 1993, perayu telah memohon kepada Mahkamah Tinggi untuk mengenepikan izin tersebut, dengan memplidkan bahawa Mahkamah Malaysia tidak mempunyai bidangkuasa untuk membicarakan kes tersebut dan *maxim forum non conveniens*.

Tuan Hakim yang bijaksana telah menolak permohonan tersebut dan memutuskan, atas autoriti *Diamond v. Bank of London & Montreal* [1979] 1-QB 333, bahawa tort salah nyata fraud, apabila dibuat melalui telefon atau teleks, telah dilakukan di tempat di mana pesanan itu dihantar, dan atas alasan itu memutuskan bahawa tort dalam kes ini telah dilakukan di Malaysia, dengan itu memberikan Mahkamah Malaysia bidangkuasa untuk mendengar kes tersebut. Selanjutnya, menurut Tuan Hakim yang bijaksana, hakikat bahawa tort tersebut telah dilakukan di Malaysia mengatasi kesemua pertimbangan lain dan rayuan *forum non conveniens* mestilah juga dengan itu gagal. Perayu dengan itu telah mengemukakan rayuan.

Dihadapan Mahkamah Agung isu-isu utama yang timbul adalah:-

1. Sama ada berdasarkan fakta-fakta tersebut Mahkamah Tinggi di Malaysia mempunyai bidangkuasa untuk mendengar tindakan yang difailkan sedemikian.

2. Sama ada dalam keadaan kes ini, Mahkamah Tinggi Malaysia merupakan *forum non conveniens* ataupun tidak.

Diputuskan:

[1] Mahkamah Malaysia mempunyai bidangkuasa ke atas defendan asing di sisi common law jika defendan tersebut sedang bermastautin di Malaysia atau jika ianya menyerah diri kepada bidangkuasa jika tidak hadir sedemikian. Walau bagaimanapun, jika beliau tidak hadir di sini dan telah tidak menyerah kepada bidangkuasa, Mahkamah Malaysia boleh menganggarkan bidangkuasa sedemikian secara statutori di bawah A. 11 k. 1(1) (h) Kaedah-Kaedah Mahkamah Tinggi 1980, kerana bidangkuasa adalah terkias dalam kuasa untuk memberikan izin oleh Mahkamah Tinggi untuk penyampaian di luar bidangkuasa. Tambahan pula, A. 11, k. 1(1)(h) Kaedah-Kaedah Mahkamah Tinggi memperuntukkan dengan jelas penyampaian diluar bidang kuasa "jika tindakan tersebut yang dimulakan oleh writ adalah berasaskan tort yang telah dilakukan di dalam bidangkuasa". Dalam kes semasa ini, walaupun perayu tidak hadir dalam bidangkuasa dan masih belum menyerah kepada bidangkuasa Mahkamah Malaysia, hakikatnya kekal bahawa pernyataan tuntutan dibuat berasaskan tort yang telah dilakukan di Malaysia. Mahkamah Malaysia dengan itu mempunyai bidangkuasa untuk mempertimbangkan tuntutan responden-responden dan Tuan Hakim yang bijaksana adalah betul dalam memutuskan isu ini.

[2] Mempunyai bidangkuasa yang sedemikian, walaubagaimanapun, bukan merupakan penyelesaian bagi perkara tersebut kerana Mahkamah masih mempunyai budibicara untuk memutuskan sama ada untuk bertindak dengan kes tersebut atas doktrin *forum non conveniens*. Dengan itu, walaupun selepas memutuskan bahawa ia mempunyai bidangkuasa untuk mendengar tuntutan tersebut, Mahkamah Tinggi haruslah pula mempertimbangkan untuk melaksanakan budibicara ke atas doktrin *forum non conveniens* iaitu sama ada untuk membenarkan atau tidak permohonan perayu untuk mengenepikan kebenaran yang telah diberikan terdahulu kepada responden yang dibuat di bawah A. 11 k. 1 Kaedah-kaedah Mahkamah Tinggi.

[3] Alasan Tuan Hakim yang bijaksana berhubung keputusannya atas isu *forum non conveniens*, walau bagaimanapun, adalah tidak memadai dan terdapat beberapa kegagalan untuk mengambil kira secukupnya perbezaan antara bidangkuasa dan *forum non conveniens*. Prinsip penting berhubung dengan doktrin *forum non conveniens* adalah bahawa terdapatnya tribunal yang lain, yang mempunyai bidangkuasa kompeten, dalam mana kes tersebut boleh dibicarakan dengan lebih bersesuaian lagi demi kepentingan kesemua pihak dan juga demi kepentingan keadilan. Perkataan "*conveniens*" di sini, walaubagaimanapun, bermaksud kesesuaian dan kewajaran bidangkuasa yang relevan dan bukan suatu kemudahan.

[4] Dalam konteks rayuan semasa ini, di mana izin untuk mengeluarkan dan menyampaikan di luar bidangkuasa satu notis writ saman di bawah A. 11 k. 1 Kaedah-kaedah Mahkamah Tinggi adalah terlibat, beban adalah atas responden, mereka merupakan plaintif, untuk meyakinkan Mahkamah Tinggi di bawah bahawa Malaysia adalah forum yang paling wajar. Selain daripada ini, Mahkamah Tinggi di bawah adalah berkewajipan untuk mempertimbangkan juga faktor-faktor lain termasuk persoalan sama ada ianya tidak adil kepada responden-responden untuk menghadkan mereka kepada remedi-remedi di tempat-tempat lain. Dan satu faktor ketara yang harus ditimbangkan adalah fasal-fasal bidangkuasa asing dalam perjanjian tersebut.

[5] Responden-responden telah dengan jelas gagal meyakinkan Mahkamah bahawa Mahkamah Malaysia adalah forum yang paling wajar untuk membicarakan tindakan tersebut. Fakta-fakta menunjukkan bahawa selain terdapat fakta bahawa fraud dan salah maklumat yang disampaikan oleh perayu kepada responden-responden telah diterima oleh responden-responden di Kuala Lumpur, kesemua transaksi lain telah berlaku di luar Malaysia. Sekuriti-sekuriti responden-responden yang relevan juga didepositkan dengan bank perayu di Singapura dan London dan bukannya di Malaysia. Dan walaupun kedua-dua responden bermastautin di Malaysia, namun watak penting daripada pihak perayu adalah pemastautin di luar Malaysia, sama ada di London atau Singapura. Dan juga tidak terdapat kesukaran yang khusus yang akan dihadapi oleh responden-responden selain daripada kesukaran dan perbelanjaan menyeberangi lebuhraya ke Singapura, jika tindakan tersebut di dengar di sana. Oleh itu Singapura seharusnya menjadi forum yang sesuai untuk membicarakan tindakan tersebut.

[Rayuan dibenarkan]

Cases referred to:
Diamond v Bank of London and Montreal Ltd (1), [1979] 1 QB 333 ***(foll)***
Spiliada Maritime Corp v Consulax Ltd (The Spiliada) (1) [1986] 3 All ER 843 ***(foll)***
*R H Hickling and Asso. Prof. Wu Min Aun(2) [1994] 3 MLJ xcvii.****(refd)***
Globus Shipping & Trading Co (Pte) v. Taiping Textile Bhd. [1976] 2 MLJ 154 ***(foll)***

Legislation referred to:
Rules of the High Court 1980, O. 11 r. 1

Other source referred to:
Stay of Actions and Forum Non Conveniens [1994] 3 MLJ xcvii by Prof. R H Hickling and Assoc. Prof. Wu Min Aun

For the appellant - K.Ananthan (C L Wong with him); M/s Skrine & Co.
For the respondents - Chin Yew Meng; M/s Allen & Gledhill

JUDGMENT

Peh Swee Chin SCJ:
At the conclusion of the hearing of arguments, we have allowed the appeal herein, indicating that we would give our reasons in writing, and now we hereby do so.

The appellant/defendant, a foreign bank, has been carrying on business, at all material times, in the Republic of Singapore (hereinafter called the foreign bank) and the respondents/plaintiffs were customers of the foreign bank in connection with foreign exchange dealings or transactions, (hereinafter called the bank customers).

To summarize, the statement of claim of the bank customers in the notice of writ of summons, alleged that bank customers were hopeful that the foreign bank would assist them in their foreign exchange transactions. The foreign bank being also a foreign exchange dealer allegedly promised to do everything possible to so assist the bank customers in such transactions, and both parties then entered into two agreements both dated 20 October 1992 under the respective titles of "Foreign Exchange, Metal and Option Agreement" and "Securities Services Agreement".

The statement of claim alleged further in effect that the bank customers gave instructions from Kuala Lumpur for foreign exchange dealings which were transacted by the foreign bank in Singapore, London and New York.

The statement of claim further alleged that for a period of 20 days, 127 foreign exchange transactions were carried out in London, New York and Singapore for a total value of US$400 million, and further that the foreign bank had acted in "fraudulent breach of a fiduciary duty" owed to them with particulars of fraud being appended to the statement of claim. It was alleged with particulars given that the foreign bank had given false and misleading information to the bank customers, obtaining a profit for itself and passing the loss to the bank customers. The bank customers therefore claimed special damages of US$10.55 million, general damages for US$10 million and costs.

It will be noticed that the action was based in tort and not contract.

An *ex-parte* summons in chambers dated 25 August, 1993 was filed together with the said notice of writ of summons bearing the same date. The said summons in chambers was fixed for hearing also on the same date with the order being made *ex parte* on the same date in terms thereon by a learned Deputy Registrar, granting leave to issue and to serve the said notice of writ of summons out of jurisdiction on the foreign bank.

The foreign bank filed a conditional appearance and a further application dated 24 December, 1993 for the order of the learned Deputy Registrar dated 25 August, 1993 above-mentioned to be set aside and for a further order that the said notice of writ of summons itself and the service of the same to be also set aside with costs.

The learned Judge who, on the whole gave an elaborate and well-reasoned judgment, (except on one point), dismissed the aforesaid application of the foreign bank, and from such dismissal, the foreign bank had appealed to us.

Two points clearly emerged as issues in this matter *viz*., first, whether our High Court had jurisdiction to hear the action thus filed, and secondly whether our High Court was or was not a *forum non conveniens* but arguments were addressed to Court without seeming to make a clear distinction between the two issues, causing perhaps a good reasoning on the part of the learned Judge on the question of jurisdiction but a rather inadequate one on the other point of *forum non conveniens.*

To summarize, it was argued to the effect for the foreign bank that first, that the subject matter of claim was in contract. Secondly, all the foreign exchange transactions and other things took place outside Malaysia, except for the instructions and information from the foreign bank to the bank customers, which were received by the bank customers in Kuala Lumpur and acted on by them in Kuala Lumpur. Thirdly both agreements had provided for all disputes between the parties to be adjudicated in Singapore.

On the other hand, it was argued first for the bank customers that the foreign bank's arguments were outside the ambit of its own application to set aside etc which was not an application to stay proceedings on the ground of *forum non conveniens*. Secondly it was argued that the only question for the High Court to decide was whether it had jurisdiction and the foreign bank's argument had strayed outside by saying that the claim was based on contract and not in tort. Thirdly the bank customers had received the fraudulent information or misrepresentations in Kuala Lumpur. Fourthly, that the respective clauses in the two agreements aforesaid about the law and jurisdiction in connection with disputes were not relevant, as the claim was in tort.

The learned Judge relied on, *inter alia,* the case of *Diamond v Bank of London and Montreal Ltd* (1), [1979] 1 QB 333 the correctness of which was conceded by the learned Counsel for the foreign bank; in that case, it was held that the tort of fraudulent and negligent misrep-

resentation when made by the telephone or telex was committed at the place where the message was received and acted on, and not the place from which it was sent. His Lordship held for this reason and others, that the High Court had jurisdiction in this matter to entertain the claim in this case.

We are in agreement with the view of the learned Judge about the point of jurisdiction. We parted company only with the learned Judge on the point of *forum non conveniens*. We set out below the relevant passage from the relevant grounds of judgment.

> As regards the *forum non conveniens*, which plea is more frequently stated than sustained, it is my view that this issue cannot be entertained as it is not really in dispute that the tort had been committed in Malaysia. This finding in effect overrides the other considerations namely that the two agreements were executed in Singapore, that there were specific clauses on governing law and jurisdiction in those agreements, that the transactions had been concluded outside Malaysia, whether there is a good arguable case, and the question of expenses, as either party would incur more expenses if the trial is held in the country of the other party. As for the witnesses, if they are from neither country, the cost of bringing them to either Singapore or Malaysia would be quite the same.
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> In the circumstances, it was my finding that there was no merit to this application and it was accordingly dismissed with costs.

We further set out below the relevant clauses of choice of law and jurisdiction, being cl. 19 of the "Foreign Exchange, Metal and Option Trading Agreement" and cl. 26 of the "Securities Services Agreement":

> Clause 19: aforesaid
>
> **Governing Law and Jurisdiction**
> This Agreement and each Contract shall be governed by and construed in accordance with the laws of Singapore and the Customer hereby irrevocably submits to the non-exclusive jurisdiction of the Singapore Courts, provided that such jurisdiction, at the sole option of the Bank, shall not be exclusive. The Customer waives any objection on the grounds of venue of *forum non conveniens* or any similar grounds and agrees that any writ, summons, order, judgment or other document shall be deemed duly and sufficiently served if addressed to the Customer and left at or sent by post to the address of the Customer last known to the Bank.
>
> Clause 26 aforesaid:
>
> **Governing Law and Jurisdiction**
> These Conditions shall be governed by and construed in accordance with the laws of Singapore and the parties, for the purposes of s. 3(3) of the Judicial Committee Act, hereby consent to be bound by the decision of the Judicial Committee of the Privy Council on any appeal thereto in respect of any dispute hereunder. The Customer hereby irrevocably submits to the jurisdiction of the Singapore Courts, provided that such jurisdiction, at the sole option of the Bank, shall not be exclusive. The Customer agrees that any writ, summons, order, judgment or other document shall be deemed duly and sufficiently served if addressed to the Customer and left at or sent by post to the address of the Customer last known to the Bank.

There was some failure to bear in mind sufficiently the distinction between the point of jurisdiction and that of *forum non conveniens* and we need to give our reasons for saying so. It is far better if we give our view of the nature of jurisdiction further.

In a case like the present one, involving some foreign elements, the question that normally first of all arises, is whether our Courts have jurisdiction i.e. power to deal with the case.

At common law, it would mean that a Malaysian Court would have jurisdiction over a foreign defendant, if he is present in Malaysia. If he is not present in Malaysia, the Malaysian Court would still have jurisdiction, if the foreign defendant has submitted to jurisdiction, i.e he has submitted to being sued in Malaysia.

If neither such a defendant can be served in this country, because he is not present here nor has he submitted to jurisdiction, then the Malaysian Courts can assume statutorily, such jurisdiction over the foreign defendant under O. 11 r. 1 of the Rules of the High Court 1980, (hereinafter called RHC) on the foreign defendant, as the conferment of such jurisdiction is implicit in connection with the granting of leave by the High Court for service out of jurisdiction etc. There is no need to go further in this case by referring to the relevant provisions of the Courts of Judicature Act 1964 etc for source or origin of such statutory jurisdiction.

Further for the purpose of the instant case, O. 11 r. I(1)h of the RHC expressly and further provides for the service out of jurisdiction "if the action begun by the writ is founded on a tort committed within the jurisdiction".

To continue with our view, it is most important to bear in mind another vital principle, that even if there is such jurisdiction to deal with the case, at common law, a Malaysian Court has still the discretion to decide whether to deal with it on the doctrine of *forum non conveniens*. If the Court exercises its discretion accordingly eg. not to deal with the case, then as the case may be, it can either stay the proceedings against the foreign defendant or refuse to grant leave to issue and serve out of jurisdiction such a notice of writ of summons, or permit an application to set aside such leave when leave has already been granted in the absence of the foreign defendant in an *ex parte* application for such leave earlier.

In the instant appeal, the statement of claim was cast in tort. The foreign bank was not present within the jurisdiction, neither had it submitted to the jurisdiction of our High Court. A trial of merits of the case at this stage was naturally out of question so long as the statement of claim disclosed a reasonable cause of action in tort. Further the necessary application for leave to issue and serve out of jurisdiction the notice of writ of summons was filed with a supporting affidavit verifying the said tort of fraud and deceit as stated in the statement of claim. It was plain from a reading of the statement of claim that the draftsman of the statement of claim must have taken great pains to ensure that it would not be read to give any facade of an action in contract.

We agreed therefore with the learned Judge that the High Court had jurisdiction in the matter for the reasons given.

As indicated, having such jurisdiction was not the end of the matter; the foreign bank applied to set aside the leave granted *ex parte* earlier to issue and serve the writ of summons out of jurisdiction. The High Court would have to consider, next, to exercise its discretion on the doctrine of *forum non conveniens* as to whether to allow or not, the application of the foreign bank, in this case, to set aside the leave to issue and serve out of jurisdiction on the foreign bank granted earlier under O. 11 r. 1 of the RHC to the bank customers.

The doctrine of *forum non conveniens* appears to have originated in Scotland and has finally found full acceptance by the House of Lords in *Spiliada Maritime Corp v Consulax Ltd (The Spiliada)* [1986] 3 All ER 843 after a series of decisions, as described and set out so well in that very interesting and readable joint article by R H Hickling and Assoc. Prof. Wu Min Aun [1994] 3 MLJ xcvii.

The main judgment in the *Spiliada* was delivered by Lord Goff, who adopted the *dictum* of Lord Kinnear in *Sim v Robinow* [1892] 19 R (ct. of Sess.) 665, 668 as being the fundamental principle in regard to this doctrine ie. that "there is some other tribunal, having competent jurisdiction, in which, the case may be tried more suitably for the interests of all parties and for the ends of justice." Lord Goff cautioned that the word "*conveniens*" in *forum non conveniens* meant suitability or appropriateness of the relevant jurisdiction and not one of convenience. We are in entire agreement with the fundamental principle so expressed.

In our view, where an application by a defendant for stay of proceedings is concerned, in applying the said doctrine, the defendant would have to satisfy the Court that "some other forum is more appropriate" per Lord Templeman in the *Spiliada*. Where on the other hand, leave to issue and serve out of jurisdiction a notice of writ of summons under O. 11 r. 1 of the RHC is involved then according to the reasoning of Lord Templeman, the plaintiff, (not the defendant, be it noted) would have to satisfy a Malaysian Court that, by comparison, that Malaysian Court is the most appropriate forum to try the action. Thus, it will be seen that in the instant case the burden lay on the bank customers, the plaintiffs to satisfy the High Court below that Malaysia was the most appropriate forum.

Having regard to the reasoning of the learned Law Lords in the *Spiliada* and the learned joint article aforesaid, we are of the considered view that in all cases of either a defendant's application for stay of proceedings or a plaintiff's application for leave to serve out of jurisdiction under O. 11 r. 1 of RHC, or for setting aside such leave, it will be obligatory for a Malaysian Court to consider in any event, a most important factor ie. whether "it would be unjust to the plaintiff to confine him to remedies elsewhere". It is indispensable when a Malaysian Court considers all cases in connection with *forum non conveniens*.

The most important factor described above does arise, of course, out of a great variety of factors that a Malaysian Court ought to consider in applying the said doctrine; the prominent one being that whether any particular forum is one with which the action has the most real and substantial connection. One can easily visualize a large number of factors which overlap with one another.

We considered the relevant factors in this instant appeal. A very glaring factor in the instant appeal was the foreign jurisdiction clauses in both the said agreements as set out above by which the bank customers had chosen Singapore Courts for the litigation ie., expressly, in other words, the bank customers had submitted to the jurisdiction of the chosen Singapore Courts; and further both parties had chosen Singapore law as the law of their choice for the litigation, prospective or otherwise.

It would be clear that, notwithstanding such clauses, a Malaysian Court ie. High Court below, could not be precluded *simpliciter* thereby from exercising the discretion, according to the doctrine of *forum non conveniens*, as to whether to hear the instant case or not, please see Federal Court's case of *Globus Shipping & Trading Co (Pte) v. Taiping Textile Bhd.* [1976] 2 MLJ 154. That said, such clauses would in any event, in some significant way, militate against any argument for the bank customers ie. plaintiffs that the Malaysian Court was the most appropriate forum. It is desirable, in passing, to point out that, had there been no choice of the Singapore Courts in the said clauses, but only the choice of Singapore law, such choice of Singapore law agreed to by both parties would not have amounted to a submission to jurisdiction of Singapore Courts.

Significantly, in a similar vein, except for the fact that the alleged fraudulent and misleading information or instructions from the foreign bank to the bank customers were received by

the bank customers in Kuala Lumpur, all 127 foreign exchange transactions had taken place, outside Malaysia, in London, NewYork and Singapore and all the securities of the customers were deposited with the foreign bank in Singapore and London. The bank customers who were husband and wife, were residents in Malaysia; but the main protagonists from the foreign bank's camp were residents outside Malaysia, either in London, or Singapore. There were no peculiar difficulties which the bank customers would face apart from the inconvenience and expenses in crossing the causeway to Singapore which was more suitable as a forum. The bank customers, as plaintiffs, had plainly failed to satisfy the Court that the Malaysian Court was the most appropriate forum to try the action which they launched.

We therefore allowed the appeal with costs here and below with the deposit in Court to be refunded to the appellant. For the avoidance of doubt, it would mean that an order in terms of the appellant's summons in chambers herein dated 24 December, 1993 would be made consequentially.